

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
THOMAS E. MYERS,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
and RUTH E. PEASE,)
)
Respondents.)

PCHB Nos. 430, 1016, and 1016-A

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THESE CONSOLIDATED MATTERS, the appeal of the granting to Ruth E. Pease a right to use surface water for irrigation from Fish Lake in Spokane County, the cancellation of that surface water permit, and the reinstatement of the same permit, having come on regularly for hearing on the 21st day of January, 1977 in Spokane, Washington before Board members W. A. Gissberg, presiding, and Chris Smith, and appellant Thomas E. Myers appearing pro se, and respondent Washington State Department of Ecology appearing through Robert E. Mack, Assistant Attorney

1 General, and respondent-permittee Ruth E. Pease appearing through her
2 attorney, Michael J. Myers, and the Board having considered the evidence
3 and having entered on the 16th day of February, 1977, its proposed
4 Findings of Fact, Conclusions of Law and Order, and the Board having
5 served said proposed Findings, Conclusions and Order upon all parties
6 herein by certified mail, return receipt requested and twenty days having
7 elapsed from said service; and

8 The Board having received exceptions to its proposed Findings,
9 Conclusions and Order from appellant Myers and response thereto from
10 respondent-permittee Pease, and having considered same and having denied
11 said exceptions, now therefore,

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
13 Findings of Fact, Conclusions of Law and Order, dated the 16th day of
14 February, 1977, and incorporated by reference herein and attached
15 hereto as Exhibit A, are adopted and hereby entered as the Board's
16 Final Findings of Fact, Conclusions of Law and Order herein.

17 DONE at Lacey, Washington, this 14th day of March, 1977.

18 POLLUTION CONTROL HEARINGS BOARD

19
20 Did not participate
ART BROWN, Chairman

21 
22 W. A. GISSEBERG, Member

23 
24 CHRIS SMITH, Member

25
26
27 FINAL FINDINGS OF FACT,
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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
THOMAS E. MYERS,

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PER W. A. GISSBERG:

A formal hearing on the consolidated appeals of these matters came on regularly before Board members W. A. Gissberg, presiding, and Chris Smith, in Spokane, Washington, on January 21, 1977.

Appellant, Myers¹ appeared pro se; respondent, Pease² appeared by her attorney, Michael J. Myers; State of Washington, Department of

1. Myers is respondent in PCHB 1016.

2. Pease is appellant in PCHB 1016.

EXHIBIT A

1 Ecology (hereinafter DOE) appeared by its attorney, Robert E. MacI,
2 Assistant Attorney General.

3 These matters were consolidated on the prior oral order of the
4 presiding officer, which order was communicated to the attorneys for
5 the parties on January 14, 1977. At the outset, the parties were
6 advised that because of the consolidation of these appeals, a
7 continuance thereof would be granted upon the request of any party
8 who felt aggrieved. No such request was made during the hearing by
9 any party and Pease specifically declined any opportunity to submit
10 further evidence to the Board on the questions of fact and law raised
11 in PCB 430.

12 Having heard the evidence and being fully advised, the Board
13 makes and enters the following

14 FINDINGS OF FACT

15 I

16 Ruth E. Pease was granted the right, on June 6, 1973, to appropriate
17 0.02 cfs of surface water for irrigation use from Fish Lake in Spokane
18 County, Washington. Thomas E. Myers, appellant, perfected his appeal and
19 objected to the appropriation of any waters alleging, in effect that:
20 (1) no water is available for appropriation; (2) he has a prior and
21 vested right which will be impaired, and (3) withdrawal of water would
22 detrimentally affect the public welfare.

23 II

24 Fish Lake is about 47 acres in size, and although its depth
25 fluctuates as much as four feet depending upon the season of the year,
26 its maximum depth is 48 feet. The lake results solely from springs and

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1 runoff from surrounding lands. Its outlet is a small stream or ditch
2 which runs through appellant's land.

3 Appellant operates a public resort on the easterly shore of the
4 lake, with facilities for 21 overnight campers, swimming, fishing and
5 boat access. Waste from as many as 1,000 persons per day is treated by
6 septic tank. The resort obtains water from both a well and the lake for
7 use as drinking water and in a store, tavern, shower facilities, and the
8 irrigation of one acre of land. From time to time the health depart-
9 ment of Spokane County tests and approves the potability of the lake
10 and well water. Appellant has complained orally to the health
11 department of his concern over pollution from a septic tank on the
12 Pease property and, while the County has inspected such, neither he
(3 nor Pease have been advised as to the result of such inspection.

14 III

15 Water for use on the Pease property has been withdrawn from the
16 lake for over forty years, while the withdrawal of lake water for use
17 at the Myers Park Resort has occurred since 1907. Two other Fish
18 Lake water withdrawal permits have been issued in the past by DOE, but
19 both of them were subsequently cancelled. Thus, appellant and Pease
20 have been and are now the only appropriators of lake water. It is
21 not known how much water appellant is taking from the lake.

22 IV

23 Appellant's appeal in PCHB 430 was settled by the parties thereto
24 and an Agreed Order was entered by this Board which directed DOE to
25 issue a permit authorizing Pease to withdraw lake water at a rate of
(3 .030 cfs, limited to 2.2 acre-feet per year, for use on one and one-

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1 half acres of land for household, lawn, garden, stock watering and
2 irrigation of hay purposes. The Stipulation signed by the parties
3 provided that the permit was to be conditioned not only in the above
4 respects, but also that "Proof of Appropriation shall be furnished
5 prior to October 1, 1975."³ The Order of the Board which disposed
6 of appellant's appeal stated that:

7
8 (2) Subject to compliance with the above stipulation and
9 this order, the appeal herein is dismissed with prejudice.

10 V

11 Although the Stipulation and Agreed Order of this Board was
12 entered on August 26, 1974, the DOE, with a display of considerably
13 less than lightning-like action, was able to comply with our Order
14 one year later on August 1, 1975 at which time it issued the permit.
15 (R-8).

16 VI

17 Because Pease had been withdrawing water from the lake for many
18 years through an existing system, all that remained to be done to
19 comply with the permit was to install a suitable water measuring device.
20 The development schedule on the permit required that complete
21 application of the water was to be made by October 1, 1975 while the
22 right to withdraw water from the lake terminated on September 15th of
23 each year. Accordingly, since the time for withdrawing water had
24 ceased for that year Pease did not install nor acquire the water

25 3. Appellant had insisted that the draftsman of the Stipulation
26 and Agreed Order include therein a provision requiring a time certain
27 for Proof of Appropriation. (See Exhibit R-6).

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 measuring device nor file Proof of Appropriation by October 1, 1975.
2 The DOE, after communicating with both appellant Myers and respondent
3 Pease and learning of the refusal of Myers to agree to an extension of
4 the October 1, 1975 appropriation date, proceeded to enter its Order of
5 Cancellation (R-11) of the permit. Respondent Pease appealed that
6 Order to this Board. (PCHB No. 1016).

7 VII

8 The final chapter in this litany of disputes, orders and appeals
9 culminated when the DOE agreed with Pease that the Order of Cancellation
10 of the permit should be rescinded, and on August 20, 1976, the DOE
11 ordered that the permit be reinstated and that Proof of Appropriation
12 be filed by October 1, 1976. Myers appealed that rescission order
13 to this Board. (PCHB 1016-A). It is the custom of the DOE to extend
14 dates for filing of Proofs of Appropriation.

15 VIII

16 Finally, Pease filed Proof of Appropriation on September 22, 1976
17 notwithstanding the fact that the water metering device had not been
18 installed.

19 IX

20 Pumping out water of the lake in the amount, for the purposes and
21 within the time provided by the agreed permit would result in the
22 annual withdrawal of .56 inches of water from the lake, thus causing
23 a greater inflow into the lake from surrounding areas. Appellant
24 Myers failed to prove that such an inflow caused, or causes pollution
25 or that the existing quality of the lake is thereby reduced. On the
26 contrary, testing of the waters of the lake for potability by a

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1 governmental agency charged with that responsibility has revealed
2 that the lake water continues to be safe for drinking even though
3 Pease has been withdrawing water from the lake and applying it to her
4 land for many, many years.

5 X

6 Any Conclusion of Law hereinafter stated which may be deemed a
7 Finding of Fact is hereby adopted as such.

8 From these Findings the Pollution Control Hearings Board comes
9 to these

10 CONCLUSIONS OF LAW

11 I

12 Appellant Myers is entitled to a decision on the merits of his
13 appeal in PCHB 430, but focused on the withdrawal of .030 cfs and the
14 other limitations of the agreed permit. When he agreed to a settlement
15 of his appeal he did so with the bargained for condition that Proof
16 of Appropriation would be furnished by Pease prior to October 1, 1975.
17 That condition was never met. Accordingly, he should and will not be
18 denied an opportunity to have this Board consider the merits of his
19 appeal, i.e., the validity of the permit authorizing the appropriation
20 of water from Fish Lake.

21 II

22 In order to lawfully grant a permit to appropriate water for
23 irrigation purposes, the DOE must affirmatively determine:⁶

24 1. Water in the amount sought is available for appropriation,
25

26 4. RCW 90.03.290.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

2. It will be applied to a beneficial use,
3. What lands are capable of irrigation from the water available,
4. Existing rights will not be impaired, and
5. The appropriation will not detrimentally affect the public welfare.

Further, fundamentals of water resource policy of the state are set forth in chapter 90.54 RCW wherein it is declared⁵ that:

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) . . . Lakes and ponds shall be retained substantially in their natural condition. . . .

III

We conclude that:

1. Water is available for appropriation.
2. It will be applied to a beneficial use. The Legislature has declared that water is beneficially used when applied to domestic, stock watering, agricultural and irrigation purposes. RCW 90.54.020.
3. The permit specifies the lands to be irrigated.
4. The lowering of Fish Lake by a maximum of .56 of an inch would not and has not for the many years of its use impaired the existing rights of either the appellant or riparian owners on the lake.
5. The appropriation will not detrimentally affect the public welfare. The evidence establishes that the

5. RCW 90.54.020

1 water of the lake has been and now is safe for
2 drinking notwithstanding that during some 30 years
3 Pease has been applying water therefrom to more land
4 than is now proposed. (See PCHB 23, which we
5 officially notice.)

- 6 6. The lake will substantially retain its natural
7 condition.

8 IV

9 The Order of the DOE granting Pease water, and the Permit
10 Number S3-01300P in the amount of 0.030 cfs should be affirmed.

11 V

12 Any Finding of Fact which should be deemed a Conclusion of Law
13 is hereby adopted as such.

14 Therefore, the Pollution Control Hearings Board issues this

15 ORDER

16 The permit issued by the DOE to Ruth E. (Shepard) Pease
17 (S3-01300P) is affirmed.

18 DATED this 16th day of February, 1977.

19 POLLUTION CONTROL HEARINGS BOARD

20
21 Did not participate
ART BROWN, Chairman

22 W. A. Gissberg
23 W. A. GISSBERG, Member

24 Chris Smith
25 CHRIS SMITH, Member

26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER